

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

TINA MAYES

Claimant,

vs.

COVENANT CARE SENIOR LIVING

Respondent,

and

CHURCH MUTUAL INSURANCE CO.

Insurance Carrier.

CS-00-0448-666

AP-00-0451-493

ORDER

Respondent requests review of the June 8, 2020, preliminary Order issued by Administrative Law Judge (ALJ) Ali Marchant.

APPEARANCES

Jonathan Voegeli appeared for Claimant. Austin J. Enns appeared for Respondent and Insurance Carrier.

RECORD AND STIPULATIONS

The Board adopted the same stipulations and considered the same record as the ALJ, consisting of the transcript of Preliminary Hearing held April 23, 2020, with Claimant's Exhibits A.1-3 and Respondent's Exhibits B.1-2, and the pleadings and orders contained in the administrative file. The Board also reviewed the parties' briefs.

ISSUE

Did Claimant sustain personal injury from an accident arising out of and in the course of her employment with Respondent on November 20, 2019?

FINDINGS OF FACT

Claimant works for Respondent, a residential care facility, as a certified medical aide. Claimant attends to the personal needs of the residents in Respondent's facility, including cooking, cleaning and care giving. Respondent's facility is a large ranch-style building. The back of the building has two bedrooms with a smaller room connected to the two bedrooms, allowing someone in the smaller room to look inside each bedroom. The

smaller room has two chairs and a recliner. Claimant usually works either from 7:00 p.m. to 7:00 a.m. or from 11:00 p.m. to 7:00 a.m., and her work includes sitting in the back room overnight watching the residents in the bedrooms and attending to calls for assistance. Claimant does not have established break times, and generally takes a paid break to eat or to rest when no one requires assistance. Claimant cannot leave the residence when she is on break. Another certified medical aide works with Claimant overnight, and Respondent permits one certified medical aide to take a brief nap if the other aide can attend to the residents.

Claimant has an eight-year-old son, who comes with her to work. Respondent allows Claimant to bring her son to work because the residents enjoy having a child around. Claimant's husband usually comes to Claimant's workplace around 1:30 a.m. to pick up their child. On occasion, Claimant's husband would watch television with the residents. Respondent permitted Claimant's husband to come to the workplace and stay.

On November 20, 2019, Claimant was at the residence performing her usual work duties. Claimant brought her son with her. Claimant's husband came to the workplace when he completed his work. Claimant, her husband and their son were in the back room overlooking the two bedrooms. Claimant and her husband were visiting at approximately 2:00 a.m. when a call bell activated. Claimant's coworker told Claimant she would address the call and shut the door to the bedroom and the back room. Claimant and her husband fell asleep.

Claimant was asleep for approximately ten minutes when she heard a noise. Claimant was startled and thought a resident required assistance. Claimant got up quickly from the chair she was sitting in, slipped, twisted her right ankle and fell. Claimant later learned her husband made the noise because he had a nightmare. As a result of the event, Claimant sustained a fracture at the right ankle.

Following the incident, Claimant called her supervisor and reported the incident. Claimant described what happened. Claimant's supervisor told Claimant her husband could no longer sleep at the residence, but Claimant was not disciplined for having her son or husband at work or for sleeping in the back room. Claimant's husband transported Claimant to Wesley Medical Center.

At Wesley Medical Center, Claimant underwent surgery. Claimant was hospitalized from November 20 to 22, 2019. Claimant was seen by Dr. Corrigan for routine follow-up appointments. Claimant was permitted to resume full-duty work on March 27, 2020, but she remains under Dr. Corrigan's care. Claimant incurred medical expenses totaling \$11,154.49.

Claimant sought medical treatment, payment of past medical expenses and temporary total disability compensation at the preliminary hearing held on April 23, 2020. On June 8, 2020, ALJ Marchant issued her preliminary Order. The ALJ found Claimant

was on a paid break when the accident occurred, and Respondent allowed Claimant's son and husband to be present with her. ALJ Marchant also found Respondent retained authority over Claimant during her break because Claimant was expected to answer calls. The ALJ concluded Claimant met her burden to prove her accidental injury arose out of and in the course of her employment with Respondent because Claimant's activities during her paid break fell within the personal comfort doctrine. ALJ Marchant awarded Claimant ongoing medical treatment, temporary total disability compensation and payment of past medical expenses. Respondent appealed.

PRINCIPLES OF LAW AND ANALYSIS

The sole issue is whether Claimant sustained personal injury from an accident arising out of and in the course of her employment with Respondent. Respondent argues Claimant's injuries were the product of a personal risk unconnected to her work duties. Claimant argues her injuries arose out of and in the course of her employment with Respondent under the personal comfort doctrine.

It is the intent of the Legislature the Workers Compensation Act be liberally construed only for the purpose of bringing employers and employees within the provisions of the Act.¹ The provisions of the Workers Compensation Act shall be applied impartially to all parties.² The burden of proof shall be on the employee to establish the right to an award of compensation, and to prove the various conditions on which the right to compensation depends.³

To be compensable, an accident must be identifiable by time and place of occurrence, produce at the time symptoms of an injury and occur during a single work shift.⁴ The accident must be the prevailing factor in causing the injury, and "prevailing factor" is defined as the primary factor compared to any other factor, based on consideration of all relevant evidence.⁵ Furthermore, the accidental injury arises out of employment only if there is a causal connection between work and the accident, and if the accident is the prevailing factor causing the injury, medical condition and resulting disability

¹ See K.S.A. 44-501b(a).

² See *id.*

³ See K.S.A. 44-501b(c).

⁴ See K.S.A. 44-508(d).

⁵ See K.S.A. 44-508(d),(g).

or impairment.⁶ “An injury occurs in the course of employment if it happens while an employee is at work in the employer’s service.”⁷

In this case, it is undisputed Claimant fell after being startled by a noise her husband made while Claimant was asleep at the place of employment on November 20, 2019. It is also undisputed the event was the primary factor, compared to any other factors, causing the injury and treatment. Because Claimant was at the place of employment during her regular working hours and subject to call if a resident required assistance when the event occurred, Claimant’s injury occurred in the course of her employment with Respondent. The issue is whether there was a work-related connection between Claimant’s work and the resulting accident.

The standard for “arising out of employment” only requires a causal connection between working conditions and the injury, and does not require the injury occur at the exact moment an employee is performing a certain job task.⁸ In this case, Respondent allowed Claimant’s husband to come to the residence and to stay for extended periods of time. Respondent also allowed Claimant to take short naps during breaks if a coworker was able to respond to call from residents. Claimant’s injury resulted while she was taking a permissible nap and was startled by her husband, who was permitted by Respondent to be at the workplace. Because Respondent allowed these things to occur, they became work-related conditions of Claimant’s employment. Therefore, Claimant’s injuries were not the result of a personal or neutral risk, but rather from a work-related risk arising out of Claimant’s employment with Respondent.

Furthermore, Claimant’s injuries are not noncompensable because they occurred during a break. Under the personal comfort doctrine, an employee engaging in an act to minister to personal comfort is still engaged in an incident of employment arising out of employment, unless the act constitutes a departure from employment so great an intent to abandon the job temporarily may be inferred.⁹ In this case, although Claimant was on a paid break when the accident and resulting injury occurred, she was permitted by Respondent to take a nap and her husband was allowed to be with her. Claimant was clearly attending to her personal comfort, but did so in a manner permitted by Respondent. Because Claimant was engaged in permissible conduct, it cannot be said Claimant was departing from her employment with the intent to abandon her job temporarily. Therefore,

⁶ See K.S.A. 44-508(f)(2)(B).

⁷ *Gould v. Wright Tree Service, Inc.*, No. 114,482, 2016 WL 2811983, at *4 (Kansas Court of Appeals unpublished opinion filed May 13, 2016)(citing *Rinke v. Bank of America*, 282 Kan. 746, 752, 148 P.3d 553 (2006)).

⁸ See *Gould*, 2016 WL 2811983, at *5.

⁹ See *id.* at *6.

Claimant's injuries are compensable under the personal comfort doctrine even if they occurred while Claimant was on a paid break.

In conclusion, Claimant met her burden of proving she sustained injuries to her right lower leg from an accident arising out of and in the course of her employment with Respondent. Respondent allowed Claimant's husband to be present at the workplace and allowed Claimant to take naps, which rendered them work-related conditions. Because Claimant's injuries arose from those work-related conditions, while Claimant was at the place of employment in service to Respondent, her injuries arose out of and in the course of her employment. Moreover, Claimant's injuries are compensable under the personal comfort doctrine. Therefore, the preliminary Order for compensation issued by ALJ Marchant, dated June 8, 2020, should be affirmed.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.¹⁰ Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by the Kansas Workers Compensation Act.¹¹

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member the Order of Administrative Law Judge Ali Marchant dated June 8, 2020, is affirmed.

IT IS SO ORDERED.

Dated this 4th day of August 2020.

WILLIAM G. BELDEN
APPEALS BOARD MEMBER

c: Via OSCAR

Jonathan Voegeli
Austin J. Enns
Hon. Ali Marchant

¹⁰ See K.S.A. 44-534a.

¹¹ See K.S.A. 44-551(l)(2)(A); K.S.A. 44-555c(j).